IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 25546 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE MOHIT S. SHAH
AND
HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UNION OF INDIA & 3 - Petitioner(s)
Versus
JAYSHREE T N WD/O. VIJAYKUMAR N ACHARYA & 1 - Respondent(s)

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Appearance :
MS AVANI S MEHTA for Petitioner(s) : 1 - 4.
MR MS RAO for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE MOHIT S. SHAH
and
HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 13/12/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE MOHIT S. SHAH)

Leave to amend the cause title by deleting petitioner No.4 and by showing Vaishnavi S. Acharya through her grand father – Narayanan Acharya, Kerala as respondent No.2.

2. This petition under Articles 226 and 227 of the Constitution is directed against the order dated 13.09.2007 of the Central Administrative Tribunal, Ahmedabad Bench in Execution Application No.07 of 2007 which has arisen from the order dated 16.03.2006 of the Tribunal in Original Application No.397 of 2005 with MA No.632 of 2005.

3. In the facts and circumstances of the case, we have taken up this petition for final disposal.

We have heard Ms Avani Mehta, learned Standing Counsel for Railways, Mr MS Rao, learned counsel for the first respondent (original applicant before the Tribunal) and Ms Shailaja, learned counsel for the second respondent who was requested to assist the Court, since the second respondent who is a minor represented by her grand father and residing in Kerala had not appeared before the Tribunal.

4. Vijaykumar Acharya was an employee with the Railways and died while in service on 19.04.2004. He was earlier married to one Sreedevi in 1998 and from that marriage a girl child Vaishnavi

(respondent No.2 herein) was born in the year 1989. The said first wife filed a divorce petition and obtained a decree of divorce on 31.05.1996. Sreedevi thereafter remarried and has been residing with her second husband. Thereafter, Vijaykumar married the first respondent herein in 1998 and by this marriage they had two children.

5. Upon the death of Vijaykumar on 19.04.2004, the first respondent approached the railway authorities for granting her the pensionery benefits payable to the heirs of the deceased. By letter dated 27.01.2005, Baroda Divisional Office of the Western Railways informed the first respondent as well as the second respondent that the following settlement dues were payable to the legal heirs of Vijaykumar :-

Shri Vijaykumar N.	P.F.	Rs. 26,923/-
DCRG – (Gratuity) Approx.		Rs.2,32,268/-
Monthly Pension		Rs. 4,650/- + D.A.
GIS Approx.		Rs. 49,422/-

By the above letter, the Railway also informed both the respondents that if they were agreeable to the above terms, they could send their terms in writing so that the amounts could be released or else they could produce the succession certificate from the competent Court after making each other party to the proceedings.

6. The first respondent, however, did not agree and filed Original Application No.397 of 2005 before the Central Administrative Tribunal. The case of the Railways was that the matter was governed by the Railway Services (Pension) Rules, 1993 under which as far as gratuity, P.F. and such retiral dues are concerned, the funds would go to the nominee in whose favour the deceased had made the nomination during his service, but if no such nomination was made, the funds would be paid to the heirs as per the provisions of Sub-Rule (5) of Rule 70 in equal shares.

As far as family pension is concerned, the case of the Railways was that the matter was governed by clauses 7 and 8 of the Rules under which where the deceased railway servant is survived by a widow, but has left behind child or children from a divorced wife or wives, such child or children if they satisfy other conditions or eligibility for payment of family pension shall be entitled to the share of family pension which the mother would have received at the time of the death of the railway servant, had she not been so divorced. The Rules further provide that upon the child or children of the divorced wife ceasing to be entitled to receive such share of the family pension, then such shares shall not lapse, but shall be payable to the other widow and/or to her eligible children, in equal shares.

7. In view of the aforesaid Rules, the Tribunal gave the following directions while allowing the Original Application :-

> "For the reasons discussed above, while allowing the OA and quashing and setting aside the impugned orders dated 27.01.2005 and 05.07.2005, we direct the respondent No.3 to make the payment of settlement dues as per the nomination made by the deceased Vijaykumar N. Acharya and if no nomination is made, then to make the payment of the Provident Fund, GIS and the share of **DCRG** to the applicant. He is further directed to pay the **admissible** amount of family pension to the applicant. The above exercise shall be carried out within three months from the date of receipt of a copy of this order and the amount payable to the applicant shall be paid with interest at the rate of 9% per annum from the expiry of three months period from the date of death of the employee till the payment is made. The respondents are also directed to bear the cost of this OA which is quantified at Rs.5,000/-."
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> (emphasis supplied)

8. The above order was challenged before this Court in Special Civil Application No.17168 of 2006. When that matter came up for hearing before another Division Bench of this Court (Coram : Hon'ble Mr. Justice B.J.Shethna and Hon'ble Mr. Justice M.D.Shah), the Court passed order dated 08.08.2006 stating that though the impugned order was passed on 16.03.2006 and the three month period was over on 16.06.2006, the order of the Tribunal was not complied with and therefore, the Court recorded the statement of learned Standing Counsel Ms Avani Mehta that Railway will comply with the impugned order of the Tribunal within two weeks. On the next day of hearing i.e. on 08.09.2006, the Court recorded the

statement of the learned Standing Counsel that by cheque dated 01.09.2006, the Railways had paid Rs.1,48,051/- to the first respondent herein, which amount did not include the amount of costs (Rs.5,000/-) and interest (Rs.4,243/-), and therefore, the Division Bench directed the Railways to send the cheque for the remaining amount of Rs.9,243/- to the first respondent within a fortnight.

Ms Avani Mehta, learned Standing Counsel states that the said direction was also complied with by the Railways.

9. The first respondent, however, filed the above-numbered Execution Application before the Tribunal and on the said application, the Tribunal has passed the impugned order dated 13.09.2007. The Tribunal has referred to the calculations of the amount which, according to the first respondent herein, are payable to her as per the aforesaid judgment dated 16.03.2006 of the Tribunal. Thereafter, the Tribunal has made the following observations in Paras 9, 10, 12 and 13 of the impugned order as under :-

> "9. As regards DCRG the Tribunal had held that in case there is no nomination amount will be paid accordingly to rules. Rule 71 of Railway Servant (Pension) Rule provides that between her and her step daughter the amount has to be shared equally. Part I of the PPO (Page 46) shows that applicant had completed 21 years of service and emoluments for purposes of DCRG was Rs.10,323/- only. The

> amount of DCRG works out to be Rs.2,16,783/- which was scored through and a figure of Rs.1,12,279/- indicated. This amount is paid to the applicant.
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> 10. The Tribunal had categorically held that only the applicant is entitled to family pension. The respondents gave an assurance to the High Court and yet did not make the payment. The only reason assigned is that they are examining the possibility of filing a SLP.
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> 12. The argument advanced by the respondents cannot be accepted. They have granted a stay of the order of High Court unto themselves.
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> 13. The respondents are directed to pay the arrears of family pension forth with on receipt of the order. We further direct that Sr DFM will not draw his salary after the receipt of this order till the arrears are paid. FA & CAO to ensure compliance of this order. Send a copy of the order to GM, Western Railway."

10. Ms Avani Mehta, learned Standing Counsel has submitted that the Tribunal has not given any finding that the deceased had made any nomination in favour of the first respondent or any other person. It is also specifically stated by the learned Standing Counsel that the deceased had not made any nomination and therefore, there was no question of the first respondent alone being entitled to get the gratuity and provident fund. It is also submitted that as far as family pension is concerned, the matter is covered by sub-Rules (7) and (8) of Rule 75 of the Railways Services (Pension) Rules, 1993 and that as per the said Rules, the daughter of the first wife of the deceased is also entitled to get family pension along with the second wife of the deceased, irrespective of the question of

any nomination because the question of nomination never arises as far as payment of family pension is concerned.

It is further submitted by the learned Standing Counsel that all that the Tribunal had directed in the judgment and order dated 16.03.2006 was making payment of the provident fund, GIS and the share of DCRG to the original applicant (first respondent herein) and also payment of the **admissible** amount of family pension to the original applicant (first respondent herein). It is, therefore, submitted even without filing any Special Leave Petition against the order of the Tribunal or against the previous order of this Court in Special Civil Application No.17168 of 2006, it is open to the Railways to submit that the first respondent i.e. the second wife of the deceased is entitled to get only 50% of the family pension till the second respondent herein (daughter of the first wife of the deceased) attains the age of 25 years (which will be on 06.08.2014) or till she marries, whichever is earlier. It is also submitted that as far as the other dues are concerned, in view of absence of any nomination, the Railways are justified in submitting that the second respondent will get one half of the other amounts. It is also stated that in compliance with the ad-interim order dated 08.10.2007 in this petition, the Railways have already deposited with the Registrar of this Court two cheques dated 19.10.2007 for the amounts of Rs.1,19,188/- (cheque No. 503283) and Rs.17,316/- (cheque No.503596).

11. On the other hand, Mr Rao for the first respondent has vehemently opposed the petition and has submitted that in view of dismissal of Special Civil Application No.17168 of 2006, by the previous orders of this Court, the present petition is not maintainable and that the petition deserves to be dismissed. It is also submitted that the Rules relied upon by the Railways were already considered and interpreted by the Tribunal and therefore, it is not open to the Railways to reagitate the issues which were already decided by the Tribunal and that the first respondent is entitled to the entire amount of the gratuity, other dues and also the entire amount of family pension right from the date of the death of the deceased.

12. As far as the second respondent is concerned, as already stated herein above, the daughter of the first wife of the deceased has been served through her grand father, but she is residing in Kerala and has not appeared before us, therefore, we have requested Ms Shailaja, learned advocate to appear for and on behalf of the second respondent, who has obviously supported the learned Standing Counsel for the Railways.

13. Having heard the learned counsel, we find considerable force in the submissions made by the learned Standing Counsel for the Railways that the Tribunal had never given any finding that any

nomination was made by the deceased in favour of the first respondent or any other person and that, therefore, the dues such as gratuity etc. were required to be paid both to the first respondent and also to the second respondent in equal shares.

14. The matters regarding grant of pension including family pension are governed by the Railway Services (Pension) Rules, 1993. Chapter-6 provides for regulation of amounts of pension. Rule 75 provides for family pension scheme, where the railway servant dies after completion of the prescribed period of continuous service. Sub-rule (6) provides for the period for which family pension is payable. Clause (d) thereof provides that if the sons and unmarried daughter including sons and unmarried daughters suffering from disorder or disability of mind are alive, the family pension shall be payable in the order of their birth irrespective of the sex of the child and the younger of him shall not be eligible for family pension unless the elder above him or her becomes ineligible for the grant of family pension. In case of twin children, the family pension shall be payable in equal shares to such twin children.

15. As far as the payment of family pension to widow/s and children in other cases is concerned, the relevant rules being sub-rules (7) and (8) of Rule 75 read as under :-

> (7) (i) (a) Where the family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares.

(b) On the death of a widow, her share of the family pension, shall become payable to her eligible child :

Provided that if the widow is not survived by any child, her share of the family pension shall not lapse but shall be payable to the other widows in equal share, or if there is only one such other widow, in full, to her.

(ii) Where the deceased railway servant or pensioner is survived by a widow but has left behind eligible child or children from another wife who is not alive, ...

(iii) Where the deceased railway servant or pensioner is survived by a widow but has left behind child or children from a divorced wife or wives, such child or children if they satisfy other conditions of eligibility for payment of family pension shall be entitled to the share of family pension which the mother would have received at the time of the death of the railway servant or pensioner had she not been so divorced :

Provided that on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares shall not lapse but shall be payable to the other widow or widows and or to other child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow, or child.

(8) (i) Except as provided in clause (d) of sub-rule (6) and clause (i) of sub-rule (7), the family pension shall not be payable to more than one member of the family at the same time.

(ii) if a deceased railway servant or pensioner leaves behind a widow or widower, the family pension shall become payable to the widow or widower, failing which to the eligible child."

(emphasis supplied)

16. Thus sub-rule (7) provides that where the family pension is payable to more widows than one, the family pension shall be paid

to the widows in equal shares. That is the main purport of clause (ii) and (iii) of Rule (7) deal with the situation where the deceased railway servant or pensioner is survived by a widow and also by children of another wife who is not alive or children from a divorced wife. Hence clauses (ii) and (iii) of sub-rule (7) are mere extensions of the contingency provided in clause (i) of Rule 7.

It is, therefore, not possible to accept the contention of Mr Rao for the first respondent that by virtue of the provisions of sub-rule (8) of Rule 75, the family pension cannot be paid to more than one member of the family at the same time and that, therefore, family pension cannot be paid to both the first respondent and the second respondent. As already indicated above, where the deceased railway servant is survived by a widow and has also left behind the children from a divorced wife, both the branches (second wife as well as child of the first wife) are entitled to get family pension in equal shares, subject to the child of the divorced wife fulfilling the other conditions of eligibility.

17. The above Rules clearly show that family pension is to be paid to one heir of the deceased, ordinarily to the widow of the deceased. Where the deceased had left behind him not only one widow with or without children but also two widows or the widow (second wife) and a divorced wife and child or children from the first marriage, such child or children are also entitled to payment of

family pension subject to their fulfilling the other eligibility criteria. There is no dispute about the fact that the second respondent (the daughter of the first wife of the deceased) is fulfilling the eligibility criteria as she has not attained the age of 25 years and she is not married. The contention urged by Mr Rao for the first respondent is that even where sub-clause (iii) of sub rule (7) of Rule 75 of the Pension Rules is applicable, it is only the widow of the deceased i.e. the second wife of the deceased (the first respondent herein) who is entitled to the full amount of family pension and that the second respondent (the daughter of the first wife of the deceased) can thereafter claim her share from the first respondent.

It is also vehemently submitted by Mr Rao for the first respondent that in view of the interpretation placed by the Tribunal on the Rules, the matter was already concluded by the first judgment of the Tribunal, the Writ Petition against which was dismissed by this Court and that for this reason also, the Tribunal must be allowed to proceed with the execution proceedings.

18. It is not possible to accept the above submissions made on behalf of the first respondent (the second wife) because even while allowing the Original Application of the first respondent by the judgment dated 16.03.2006, the Tribunal had specifically directed the Railways to pay “the **admissible** amount of family pension to the original applicant”. As already pointed out by us, the

admissible amount of family pension payable to the second respondent (the daughter of the first wife of the deceased) is one-half of the family pension because the daughter of the first wife of the deceased has not married and has not yet attained the age of 25 years. The provisions of clause (iii) sub-clause (7) of Rule 75 of the Railway Services (Pension) Rules, 1993 are so clear that it is not possible to accept Mr Rao's contention that the first respondent (the second wife) alone is entitled to receive the full family pension. As regards the provisions of Clause (i) of sub rule (8) on which reliance has been placed by Mr Rao that Clause is to be read as a part of sub rule (7) of Rule 75 and is not to be read in isolation. Looking to the manner in which the first respondent has been fighting against the second respondent for the last more than two years, it is not possible to believe that the first respondent will accept the full family pension and part with 50% of that amount in favour of the second respondent.

19. In exercise of our extra ordinary writ jurisdiction under Article 226 of the Constitution also, we are of the view that it would be just to mould the reliefs appropriately which should be in consonance with clause (iii) of sub rule (7) of Rule 75 of the Pension Rules and therefore, we accept the submission made by the learned Standing Counsel for the Railways that they are justified in separately paying one-half family pension amount to the second respondent i.e. the daughter of the first wife of the deceased viz.

second respondent – Vaishnavi represented by her grand father Narayanan Acharya.

20. In the result, we allow this petition and set aside the impugned order dated 13.09.2007 passed by the Tribunal in Execution Application No.07 of 2007.

We, however, make it clear that we have not gone into the question of detailed calculations of the amounts payable by way of family pension or gratuity and other dues payable to the heirs upon the death of Vijaykumar, but we have only dealt with the controversy about the shares in which the amounts are payable to the first respondent and the second respondent as per the findings given in paras 13 and 19 herein above.

It will be open to the second respondent to withdraw the amounts deposited by the Railways by the aforesaid cheques dated 19.10.2007 for the amounts of Rs.1,19,188/- and Rs.17,316/- after giving proper identification and also giving her bank account number where the cheques will be deposited, and the amounts shall be paid to the second respondent – Vaishnavi Vijaykumar Acharya by account payee cheques after proper verification.

[MOHIT S. SHAH, J.] [RAVI R. TRIPATHI, J.]

mrpandya*